

this section.”¹⁷¹ But LBI’s discrimination claim accrued on November 13, 2014. That was the day that Mr. Nissenblatt sent Mr. Martinez a carriage proposal under which [REDACTED]

[REDACTED] }¹⁷² LBI now alleges that this proposal was and is discriminatory, because it did not provide EstrellaTV “carriage parity” with Telemundo. Thus, Comcast’s November 13, 2014 proposal was an “offer to carry [EstrellaTV’s] programming pursuant to terms that a party alleges to violate one or more of” the carriage program rules.¹⁷³ LBI had one year from the date of Comcast’s proposal to file its Complaint, and did not do so.

73. The parties’ ensuing negotiations erase any doubt that LBI was on notice of its potential claim. In a November 26, 2014 email, Mr. Martinez openly alleged that Comcast was not giving EstrellaTV a chance to compete fairly with Comcast affiliate Telemundo,

[REDACTED] }¹⁷⁴ No later than that date, then, LBI understood the core allegations in its present Complaint: that Telemundo was owned by Comcast; that Comcast gave Telemundo more favorable treatment than EstrellaTV; and that Comcast purportedly favored Telemundo on the basis of affiliation. Indeed, in its Complaint, LBI alleges that prior to even entering into negotiations with Comcast in the fall of 2014 it understood that it could request carriage on the same terms as Telemundo “in reliance on the law . . . prohibiting Comcast from

¹⁷¹ See 47 C.F.R. § 76.1302(h)(2); Compl. ¶ 15 n.24.

¹⁷² See ¶ 8, *supra*.

¹⁷³ 47 C.F.R. § 76.1302(h)(3).

¹⁷⁴ See ¶ 12, *supra*.

offering Estrella TV carriage on ‘less favorable’ terms than affiliated Telemundo.”¹⁷⁵ Once Comcast rejected LBI’s carriage parity proposal, made “in reliance on” the program carriage rules, LBI had one year to file a claim.

74. Likewise, LBI’s financial interest claim—concerning Comcast’s request for digital rights—is also untimely. Mr. Nissenblatt sent LBI a proposed retransmission consent agreement requesting {REDACTED} digital rights to EstrellaTV content on November 13, 2014.¹⁷⁶ This was an “offer to carry” EstrellaTV on terms and conditions that it now alleges violate Section 616.¹⁷⁷ LBI had one year from that date to file its Complaint, but again, did not do so.

75. To support its position that the Complaint is timely, LBI alleges that it was filed within one year of the end of a so-called “Discussion Period” that ended on October 15, 2015.¹⁷⁸ LBI provides no support for its claim that the statute of limitations was tolled during a negotiating period that occurred after Comcast made its allegedly discriminatory offers of carriage. Nor could it. On its face, 47 C.F.R. § 1302(h)(2) requires a plaintiff to file a program carriage complaint within one year of an MVPD’s “offer to carry” the plaintiff in violation of the rules. The Comcast offer of carriage LBI cites in its Complaint was made on November 13, 2014, and LBI made it clear within weeks that it believed it had grounds to bring a program carriage complaint. That LBI chose to negotiate with Comcast after its claims had accrued is

¹⁷⁵ Compl. ¶ 36; *see also* Compl. Ex. 7 (“[F]rom the beginning of the LBI/Comcast discussions in 2014 until their conclusion late last year, Comcast refused to provide any significant distribution of Estrella TV programming . . . and Comcast has rejected out-of-hand any type of fair compensation for Estrella TV distribution.”).

¹⁷⁶ Compl. Ex. 19 (Nov. 13, 2014 email and attachment from M. Nissenblatt, Retransmission Consent Agreement Attachment A).

¹⁷⁷ Comcast made an identical offer for digital distribution of EstrellaTV content on January 23, 2015; it is this offer that LBI alleges was Comcast’s “Digital Rights Demand” in violation of the program carriage rules. Compl. ¶¶ 41, 41 n.71, 84, Ex. 19 (Feb. 13, 2015 email from J. Martinez). This date, too, falls well outside the one-year period within which LBI could bring its claim.

¹⁷⁸ Compl. ¶ 15 n.24.

irrelevant: the Commission's regulations contain no exception to the general rule that a party attempting to negotiate a business resolution of its claims prior to filing a lawsuit is still bound by the statute of limitations.¹⁷⁹

76. Moreover, the three triggering events in 47 C.F.R. § 1302(h) are discrete; the accrual of a new claim under one provision does not revive a time-barred claim under another. For example, an allegedly discriminatory offer to amend a contract more than a year after its execution does not reopen the limitations period for the original contract.¹⁸⁰ To allow a party to reopen the limitations period for a claim based on a prior offer "simply by making a pretextual demand for broader carriage . . . would [] directly contradict the entire purpose of the statute of limitations."¹⁸¹ Similarly, the fact that Comcast continued to offer carriage to LBI on terms that LBI alleges reflect affiliation-based discrimination does not change the fact that LBI's Complaint is untimely. LBI is not entitled to "accumulate" discrimination claims and then file its Complaint based on the limitations period applying to the last one.¹⁸²

77. Finally, LBI cannot invoke 47 C.F.R. § 76.1302(h)(3) as a basis for

¹⁷⁹ See, e.g., *Cristwell v. Veneman*, 224 F. Supp. 2d 54, 61 (D.D.C. 2002) ("To excuse filing obligations on equitable grounds solely because parties were engaged in settlement discussions would virtually eviscerate filing time requirements and throw the orderly and expeditious processing of . . . cases into . . . disarray."); *Cromeartie v. RCM of Wash., Inc.*, 118 F. Supp. 3d 338, 338 n.3 (D.D.C. 2015) (same); *Leiterman v. Johnson*, 60 F. Supp. 3d 166, 189 (D.D.C. 2014) (same).

¹⁸⁰ *Tennis Channel*, 717 F.3d at 999 (Edwards, J., concurring); cf. *Hutchens Comm'ns*, 9 FCC Rcd. at 4849, ¶ 19 (holding that "[w]e reject Hutchens' argument that the untimely filing of its leased access claim can be cured by including an allegation that TCI engaged in a continuing violation of the Commission's program access rules," because the allegations "are entirely unrelated to the leased access rules, and thus cannot review an otherwise untimely leased access claim").

¹⁸¹ *Tennis Channel*, 717 F.3d at 996 (Edwards, J., concurring); accord Second Report & Order at 11522 ¶¶ 38–39.

¹⁸² See, e.g., *Citta*, 2010 WL 3862561, at *17 ("[W]here a plaintiff knew, or should have known, that each act was discriminatory, plaintiff may not accumulate all the discriminatory acts and bring suit . . . based on the statutory period applicable to the last one.")

claiming that its Complaint is timely.¹⁸³ Although the rule, on its face, provides LBI with one year from its pre-filing notice letter to file its Complaint, “the Commission has consistently held that [this] trigger is applicable only in situations when an MVPD denies or refuses to acknowledge a request to negotiate for carriage.”¹⁸⁴ LBI does not allege that Comcast refused or ignored any request to negotiate, nor could it: the parties discussed and negotiated EstrellaTV carriage for over a year.¹⁸⁵ As a result, there is no doubt that LBI’s Complaint is untimely.

IV. COMCAST MADE A REASONABLE, GOOD FAITH BUSINESS DECISION TO DENY LBI’S CARRIAGE PROPOSALS

78. For the reasons described above, LBI’s Complaint is deficient as a matter of law. But even if it were not, LBI would nonetheless be unable to make out a *prima facie* case because it has not shown and cannot show that Comcast made its carriage decisions concerning EstrellaTV on the basis of affiliation. Rather, the facts show that Mr. Nissenblatt and his team came to an informed decision about EstrellaTV’s appeal to Comcast customers based on the network’s position in the marketplace and available viewing data, and concluded in good faith that the benefits Comcast would obtain from carrying EstrellaTV on the terms LBI proposed could not begin to justify the high price tag that LBI demanded.

¹⁸³ “Any complaint . . . must be filed within one year of the date on which . . . (e) A party has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.” 47 C.F.R. § 76.1302(h)(3).

¹⁸⁴ *Tennis Channel*, 717 F.3d at 1007 (Edwards, J., concurring) (citing *1998 Biennial Regulatory Review—Part 76—Cable Television Service Pleading and Complaint Rules*, Order on Reconsideration, 14 FCC Rcd. 16433, 16435, ¶ 5 (1999)).

¹⁸⁵ See generally Nissenblatt Decl. Precisely because Comcast was engaged in discussions concerning broadcast retransmission consent with LBI, the good-faith rules that apply in that context could be read to require that Comcast had a continuing duty to engage with LBI’s further proposals. See generally 47 C.F.R. § 76.65(b). This is yet another reason why it would make no sense to interpret the Communications Act as imposing dual (and inconsistent) retransmission consent and program carriage obligations on an MVPD—the retransmission consent regime’s requirement that an MVPD should respond on a continuing basis to retransmission consent proposals would eviscerate the program carriage statute of limitations. Thus, if the Bureau were to conclude that broadcasters have standing to bring program carriage claims, it cannot appropriately hold that Comcast’s continued discussions with LBI beyond November 2014 make LBI’s complaint timely. Conversely, if only the retransmission consent rules apply, there is no need to consider this program carriage-specific defense.

79. The overwhelming (and indisputable) evidence showing that Comcast made its carriage decision in good faith is, standing alone, yet another basis for dismissing LBI's Complaint. The good faith basis for Comcast's decision is also confirmed by marketplace evidence of how other MVPDs carry EstrellaTV; that evidence shows that no other MVPD carried EstrellaTV on the terms LBI demanded from Comcast. Finally, the evidence shows that Comcast does not favor its affiliated Spanish-language networks, but rather carries a wide variety of Spanish-language networks that are not affiliated. In all, the evidence confirms that Comcast made legitimate and good faith carriage decisions concerning EstrellaTV, "based on a reasonable business purpose," that cannot form the basis for a complaint of discriminatory carriage.¹⁸⁶

A. Comcast's Contemporaneous Decisionmaking Process Reflects that Its Decision Was Made for Non-Discriminatory Reasons

80. LBI bears the burden of proving that its unaffiliated status "actually motivated" Comcast's decision.¹⁸⁷ Under Commission regulations, it can do so through direct evidence, that is "[d]ocumentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim."¹⁸⁸ LBI has presented no such direct evidence. Nor could it. As Mr. Nissenblatt states, "[n]either EstrellaTV's ownership nor Telemundo and NBC Universo factored into my or my team's decision making concerning the terms and conditions of carriage of EstrellaTV in any way."¹⁸⁹

81. LBI's burden to make out a circumstantial case is no different: it still

¹⁸⁶ *Tennis Channel*, 717 F.3d at 985.

¹⁸⁷ See *Herring Broadcasting Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 24 FCC Rcd. 12967, 12997, ¶ 63 (ALJ 2009) ("*WealthTV*").

¹⁸⁸ 47 C.F.R. § 76.1302(d)(3)(iii)(B). See also Second Report & Order, 26 FCC Rcd. at 11503, ¶ 12.

¹⁸⁹ Nissenblatt Decl. ¶ 3.

must show that EstrellaTV's affiliation "actually motivated" Comcast's decision.¹⁹⁰ Therefore, if Comcast had "legitimate reasons for" its carriage decision, "borne out by the record and not based on the programmer's affiliation or nonaffiliation," LBI's claim of discrimination must fail.¹⁹¹ Examples of legitimate business reasons for an adverse carriage decision include a lack of subscriber demand and interest, the cost of carriage, unfavorable terms and conditions of carriage, the carriage decisions of other cable operators, and bandwidth constraints.¹⁹²

82. Comcast had legitimate business reasons to reject LBI's requests for carriage. LBI demanded carriage and fees that bore no relationship to EstrellaTV's popularity among Hispanic audiences, both nationally and in relevant local markets. LBI sought [REDACTED] [REDACTED] fees without even offering a hint to Comcast as to how they would be recovered. EstrellaTV would have occupied valuable bandwidth on Comcast systems. And when LBI pulled its EstrellaTV signal from Comcast subscribers in the Houston, Denver, and Salt Lake City markets, Comcast saw essentially no adverse reaction from subscribers, confirming its good faith judgment that the limited appeal of EstrellaTV to Comcast's customers did not justify the level of fees demanded by LBI.

83. From the parties' first meeting to discuss EstrellaTV carriage, on October 14, 2014, Mr. Nissenblatt and his team understood that EstrellaTV [REDACTED]
[REDACTED]

¹⁹⁰ See *WealthTV*, 24 FCC Rcd. at 12997–98, ¶ 63.

¹⁹¹ *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, 18105, ¶ 11 (2010) ("MASN").

¹⁹² See *MASN*, FCC Rcd. at 18106–15, ¶¶ 13–20 (holding that subscriber demand, costs of carriage, bandwidth constraints, and carriage decisions of other cable operators are legitimate reasons to deny carriage); *WealthTV*, 24 FCC Rcd. at 12985–86, ¶ 39 (noting bandwidth constraints, subscriber interest and demand, carriage on other MVPDs, and "brand recognition" as legitimate considerations).

[REDACTED]

}

84. Based on their assessment of EstrellaTV's position in the market, Mr. Nissenblatt and Comcast rejected LBI's November 2014 proposal, { [REDACTED] }¹⁹⁹ In order to manage its programming budget in the face of mounting costs, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }²⁰¹ In its proposal, LBI sought

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } These facts can lead to only one conclusion: that Comcast had legitimate and non-discriminatory reasons for rejecting LBI's

¹⁹⁹ *Id.* Ex. 3.

²⁰⁰ *Id.* ¶¶ 12–13.

²⁰¹ *Id.* ¶ 15.

demands.

85. During the months of negotiations that followed, Mr. Nissenblatt and his team continued to review EstrellaTV's Nielsen ratings. Year-to-date national ratings through November 2014 showed EstrellaTV delivering only [REDACTED] of UniMás's audience, [REDACTED] of Telemundo's, and [REDACTED] of Univision's.²⁰² Ratings in the Los Angeles market, EstrellaTV's strongest, were similarly weak.²⁰³ Moreover, Comcast reviewed set-top box data showing that EstrellaTV was not heavily viewed among Comcast customers, further demonstrating that the limited appeal of the network and the limited benefits to Comcast of carrying it.²⁰⁴

86. Thus, beginning in November 2014, and throughout the parties' negotiations, Comcast consistently [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁰² *Id.* Ex. 4.

²⁰³ *Id.* ¶ 54.

²⁰⁴ Compl. Ex. 19 (Feb. 5, 2015 email from M. Nissenblatt); Nissenblatt Decl. ¶ 42.

²⁰⁵ Compl. Ex. 19 (Feb. 5, 2015 email from M. Nissenblatt); Nissenblatt Decl. ¶¶ 32, 39–43, 49.

²⁰⁶ Compl. Ex. 19 (Feb. 5, 2015 email from M. Nissenblatt); Nissenblatt Decl. ¶¶ 39–43, 49.

[REDACTED]

[REDACTED]²⁰⁷

87. The absence of meaningful customer reaction after LBI pulled the EstrellaTV signal in Houston, Denver, and Salt Lake City provides further proof that Comcast's carriage decision reflected valid business considerations. Despite a sustained public relations campaign by LBI, in which it alleged (falsely) that EstrellaTV would be "forced off the air" by Comcast, and in which it promised gifts to customers who disconnected their service in protest, only a small number of customers left Comcast.²⁰⁸ In the two months that followed LBI's decision to pull its signals in Houston, Denver, and Salt Lake City, fewer than { [REDACTED] } (of hundreds of thousands of Hispanic customers in those markets) identified the loss of EstrellaTV as their reason for canceling.²⁰⁹ The revenue Comcast lost from these customers pales in comparison to the { [REDACTED] } LBI had demanded.²¹⁰ Comcast continued to monitor customer disconnects through the spring of 2015, and saw no meaningful fallout from losing EstrellaTV.²¹¹ This not only reaffirmed Mr. Nissenblatt's initial decision { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²¹²

88. Comcast's considered judgments are precisely the types of business

²⁰⁷ See, e.g., Nissenblatt Decl. ¶¶ 43, 49.

²⁰⁸ Id. ¶¶ 44–45, 51–53.

²⁰⁹ Id. ¶ 52. { [REDACTED] } Id.

²¹⁰ Id. ¶ 53.

²¹¹ Id. ¶¶ 56–57.

²¹² Id. ¶ 57.

justifications for carriage decisions that have been found to be legitimate in past cases. Comcast determined that EstrellaTV “had failed to provide . . . ratings data or other form of empirical proof of customer interest,”²¹³ and that EstrellaTV’s limited distribution on other MVPDs and “high cost of carriage” were reasons not to carry it.²¹⁴ Moreover, by expressing its interest in

[REDACTED], Comcast showed “a willingness to carry within business limitations or at least to consider carriage of [EstrellaTV] when it would be in the company’s best interest.”²¹⁵

Indeed, the idea that Comcast was seeking to benefit Telemundo and NBC Universo makes no sense, considering that, beginning in October 2014 and throughout the parties’ negotiations,

[REDACTED] }²¹⁶ If Comcast had intended to divert viewers or advertising dollars away from EstrellaTV and towards its affiliated networks, it would make little sense to [REDACTED] }

89. As for Comcast’s eventual decision not to put EstrellaTV back on the air in the affected markets, it arose from a “natural experiment” in which customers failed to react in any meaningful way when they were deprived of EstrellaTV, thereby demonstrating that the network had no significant appeal.²¹⁷ In the end, because of bandwidth constraints, Comcast “lacks capacity to carry all the networks that seek affiliation and must decide what networks are in its best interest to carry” and “concluded that [EstrellaTV] had not shown that its carriage

²¹³ *WealthTV*, 24 FCC Rcd. at 12985, ¶ 38.

²¹⁴ *See MASN*, 25 FCC Rcd. at 18111–12, ¶¶ 18–19.

²¹⁵ *See WealthTV*, 24 FCC Rcd. at 12986, ¶ 39.

²¹⁶ *See generally* Compl. Ex. 19; Nissenblatt Decl. ¶¶ 29, 32, 43, 49.

²¹⁷ *See Tennis Channel*, 717 F.3d at 986 (“Perhaps more telling is the natural experiment conducted in Comcast’s southern division . . . When Comcast repositioned Tennis to the sports tier . . . thereby making it available to Comcast’s general subscribers only for an additional fee, not one customer complained about the change.”).

would assist [Comcast] to attract or maintain subscribers” in those markets.²¹⁸ Comcast’s actions reflect rational, thoughtful, business decisions, not discriminatory intent. Absent evidence that Comcast’s decision was actually borne of a discriminatory impulse, there is no reason to interfere with or question Comcast’s decision to deny the aggressive carriage demands LBI made.²¹⁹

90. LBI has alleged no such facts. Instead, LBI makes a number of allegations that are irrelevant or simply untrue.

91. First, LBI suggests that Comcast relied solely on STB data in making its carriage decision, instead of “industry-standard” Nielsen ratings.²²⁰ This is wrong. In addition to other material they examined (such as EstrellaTV carriage on other MVPDs), Mr. Nissenblatt’s team reviewed a substantial amount of Nielsen ratings during the parties’ negotiations, and came to the conclusion that EstrellaTV was not a popular network.²²¹ The data they reviewed reflected long time periods (several months, at least), across broad dayparts (total day or primetime for the entire week), and for all viewers.²²² The Comcast team had every reason to reject the Nielsen ratings presented by LBI, which reflected [REDACTED]

[REDACTED]

[REDACTED] }²²³

92. Second, LBI suggests that Comcast relied solely on national Nielsen

²¹⁸ See *WealthTV*, 24 FCC Rcd. at 12986, ¶ 39; see also *MASN*, 25 FCC Rcd. at 18113, ¶ 20 (finding “channel capacity” a legitimate reason to refuse a carriage proposal).

²¹⁹ See *WealthTV*, 24 FCC Rcd. at 12997–99, ¶¶ 63, 67.

²²⁰ Compl. ¶ 66.

²²¹ Nissenblatt Decl. ¶¶ 23–27, 40, Exs. 1, 4.

²²² See *id.* ¶¶ 23–27, 40, Exs. 1, 4.

²²³ See *id.* ¶ 27, Exs. 2, 6.

ratings to make its decision.²²⁴ This, too, is untrue. Mr. Nissenblatt and his team reviewed Nielsen data for major Hispanic markets, including New York, Chicago, Houston, and EstrellaTV's home market, Los Angeles.²²⁵ These ratings, like EstrellaTV's national ratings, showed that it was a weak network.²²⁶

93. The national and local Nielsen ratings examined by Comcast's economist, Dr. Israel, confirm Mr. Nissenblatt's contemporaneous conclusion concerning the limited popularity of EstrellaTV. For example, Dr. Israel concludes that Telemundo attracted {REDACTED} times the national audience that EstrellaTV did in 2014.²²⁷ As for individual markets, Telemundo's audience in New York City, the nation's second-largest Hispanic market, was {REDACTED} than EstrellaTV's that same year.²²⁸ The ratings in the markets at issue in this case—Houston, Denver, and Salt Lake City—show EstrellaTV consistently trailing Telemundo, Univision, and, with the exception of Salt Lake City, UniMás.²²⁹ LBI's claim that EstrellaTV is as popular as Telemundo is simply not borne out by the facts.

94. Moreover, an additional Nielsen analysis conducted by Dr. Israel—one not even attempted by LBI's expert—shows that Comcast would not have been acting rationally by targeting EstrellaTV in order to favor its affiliated Spanish-language networks. Dr. Israel conducted a regression analysis of Nielsen ratings over the period January 2013 through March 2016 in Houston, Denver, and Salt Lake City, to determine whether Telemundo and NBC Universo viewership in those markets increased as a result of LBI's decision to pull EstrellaTV's

²²⁴ Compl. ¶ 67.

²²⁵ See Nissenblatt Decl. ¶¶ 24–25, 54, Ex. 1.

²²⁶ Nissenblatt Decl. ¶¶ 24–25, 54.

²²⁷ Israel Decl. ¶ 24.

²²⁸ *Id.* ¶ 25.

²²⁹ *Id.* ¶ 23, Appendix 2 Exs. 2–4.

signal from Comcast, after accounting for other factors that explain Telemundo's and NBC Universo's viewership in those DMAs.²³⁰ Dr. Israel found no statistically significant relationship between the loss of EstrellaTV and any change in the ratings of either Telemundo or NBC Universo.²³¹ Although no MVPD is required to conduct this type of analysis, or anything like it, when reaching a carriage decision, Dr. Israel's *ex post* confirmation that there is no meaningful competition between EstrellaTV and Comcast's affiliated networks is compelling additional supporting evidence that Comcast had nothing to gain by treating EstrellaTV unfavorably. The demonstrated lack of competition for viewers confirms that Comcast's decision not to accept LBI's proposed carriage terms was a legitimate business judgment, not affiliation-based discrimination.

95. Third, LBI suggests that Comcast suffered customer loss as a result of LBI pulling its signals in the affected markets.²³² The only evidence LBI puts forth is a purported increase in phone calls made to LBI after LBI pulled its signal in Houston, Denver, and Salt Lake City.²³³ LBI does not allege that any of these customers ever called Comcast to complain, much less canceled their service. And in fact, as noted, Comcast's records show that fewer than { [REDACTED] } of the hundreds of thousands of Hispanic customers in those markets canceled their service after LBI pulled its signals.²³⁴

B. Carriage of EstrellaTV and Telemundo by Other MVPDs Further Supports Comcast's Good Faith Carriage Decision

96. LBI also alleges that a "plethora of sophisticated MVPDs" distribute

²³⁰ *Id.* ¶¶ 42–44, Appendix 3 Ex. 6.

²³¹ *Id.*

²³² Compl. ¶ 71.

²³³ *Id.*

²³⁴ Nissenblatt Decl. ¶ 52.

EstrellaTV, but that Comcast has denied LBI's carriage requests.²³⁵ LBI then asserts that these alleged differences in carriage must be attributable to the fact that Comcast favors Telemundo at EstrellaTV's expense.²³⁶ The inference LBI seeks to draw from this allegation is, to be clear, a circumstantial one. The Media Bureau has never found disparate carriage among MVPDs, standing alone, sufficient to make out a *prima facie* case of discrimination. In any case, the Bureau need not do so here. LBI has failed to identify a single MVPD that has agreed to the terms LBI sought from Comcast, and indeed, publicly-available data show that LBI's allegations about EstrellaTV carriage are unsupported in fact.²³⁷

97. For example, LBI alleges that EstrellaTV is carried by both DirecTV and DISH,²³⁸ which together have over 30 million subscribers nationwide. Although these DBS providers may carry EstrellaTV in some areas where LBI operates broadcast stations or has affiliate stations, neither of them makes EstrellaTV available for purchase on their broadly-distributed Spanish-language programming packages.²³⁹ In contrast, both DISH and DirecTV provide Telemundo and NBC Universo to Spanish-speaking customers nationwide.²⁴⁰

98. Moreover, although LBI demanded that Comcast carry EstrellaTV in

[REDACTED]

[REDACTED]

²³⁵ Compl. ¶¶ 55–56. Notably, LBI has failed to identify a single MVPD that agreed to the terms LBI sought from Comcast. Having failed to come forward with such evidence in the Complaint, it would be inappropriate for LBI to so on reply. See n.89, *supra*.

²³⁶ *Id.* ¶ 56.

²³⁷ *Id.* ¶¶ 55–56.

²³⁸ *Id.* ¶ 55.

²³⁹ Israel Decl. ¶ 32.

²⁴⁰ *Id.*

[REDACTED] }²⁴¹ Thus, LBI asked Comcast to carry EstrellaTV on a level of distribution—both nationally and in specific markets—that other major MVPDs do not appear to provide.

99. Publicly-available data also demonstrate that LBI demanded fees from Comcast that no other MVPDs pay. According to the SNL Kagan data examined by Dr. Israel, EstrellaTV earned only {REDACTED} in “network compensation” revenue in 2015, and only {REDACTED} in non-advertising revenue.²⁴² This indicates that, although LBI was demanding {REDACTED} from Comcast in 2015 in exchange for retransmission consent and carriage rights, other MVPDs paid {REDACTED} for those same rights.²⁴³

100. By LBI's own admission, none of the other MVPDs in the marketplace—
 [REDACTED] }—have made their carriage
 decisions based on affiliation.²⁴⁴ There is no reason to infer that Comcast has done so either.

C. Comcast's Carriage of Spanish-Language Networks Reflects an Absence of Affiliation-Based Discrimination

101. As LBI concedes in its Complaint, in addition to the popular broadcast networks Univision and UniMás, Comcast distributes programming from dozens of non-affiliated Spanish-language and Hispanic-targeted networks. These include broadcast networks, such as Azteca and LATV, and cable-only networks such as Galavisión, Discovery en Español, and beIN Sport en Español.²⁴⁵ Moreover, Comcast has launched many of these networks since

241 *Id.* ¶ 33.

242 *Id.* ¶ 29.

243 *Id.*

²⁴⁴ Compl. ¶ 55 (“Such companies share a common characteristic – none holds an ownership interest in a programming channel or network that competes with EstrellaTV.”)

²⁴⁵ See Compl. Ex. 10.

acquiring an interest in Telemundo and NBC Universo in 2011.²⁴⁶ Comcast's continued support of these networks is entirely inconsistent with LBI's allegation that Comcast is trying to "protect" Telemundo and NBC Universo from competition.

102. Finally, Comcast's carriage of its affiliated Spanish-language networks over time shows that its current carriage is not driven by favoritism. Comcast has carried Telemundo at a broad rate of penetration for many years, via both broadcast signal and satellite transmission, and has carried NBC Universo (and its predecessor, mun2) broadly for many years as well; Comcast's distribution of these networks { [REDACTED] } since Comcast acquired an ownership interest in them.²⁴⁷ This strongly suggests that Comcast's continued broad carriage is based on justifiable business considerations, and not discrimination.

V. LBI CANNOT MAKE OUT A CLAIM THAT BROADER CARRIAGE ON COMCAST WOULD PROVIDE COMCAST WITH A "NET BENEFIT"

103. In the face of this evidence of Comcast's good faith decision not to accede to LBI's unprecedented demands to pay { [REDACTED] }, LBI is required, under D.C. Circuit and Commission precedent, to come forward with evidence that "broader carriage would have yielded net benefits" to Comcast.²⁴⁸ But LBI has not alleged, much less provided evidence, that Comcast would realize benefits from carrying EstrellaTV on the terms demanded that would outweigh the additional costs that Comcast would incur.

104. For one thing, LBI's Complaint does not discuss any of the costs Comcast would bear from granting EstrellaTV the "carriage parity" with Telemundo that LBI requested.

²⁴⁶ See Compl. ¶ 48.

²⁴⁷ Israel Decl. ¶ 34.

²⁴⁸ *Tennis Channel, Inc. v. Comcast Cable Comm'ns, LLC*, 30 FCC Rcd. 849, 852, ¶ 7 (2015); *Tennis Channel*, 717 F.3d at 985 (citing *MASN*, 25 FCC Rcd. at 18103, ¶ 22).

Those costs are, however, well-documented: under the proposal LBI made in November 2014, and repeated in January 2015, {REDACTED}

{REDACTED}²⁴⁹ LBI's next proposal, {REDACTED}

{REDACTED}²⁵⁰ LBI's demand for carriage in the Complaint—that Comcast carry EstrellaTV “wherever” and “however” it carries Telemundo, and compensate LBI “to the extent it compensates Telemundo”²⁵¹—would cost Comcast just as much, or more.

105. Moreover, nowhere does LBI allege any facts showing how Comcast would generate additional revenue by carrying LBI more broadly, much less additional revenue sufficient to offset the {REDACTED} fees it demanded from Comcast. Specifically, LBI has not alleged that any subscribers “would switch to Comcast if it carried [EstrellaTV] more broadly,” or that any subscribers “would leave Comcast in the absence of broader carriage” of EstrellaTV.²⁵² Without such evidence—or even, apparently, a good-faith basis to make such allegations—LBI's carriage discrimination claim must be dismissed.

106. LBI attempts to overcome this pleading failure by relying on its expert, Dr. Furchtgott-Roth, to argue that EstrellaTV has “value” to Comcast. The support LBI musters consists of its expert's discussion of EstrellaTV's Nielsen ratings and LBI's own allegations concerning EstrellaTV carriage by other MVPDs. As for Nielsen ratings, LBI alleges that EstrellaTV is valuable to Comcast because it garners Nielsen ratings above 0.1 in certain markets

²⁴⁹ Nissenblatt Decl. ¶ 31, Ex. 3.

²⁵⁰ *Id.* ¶ 39, Ex. 5.

²⁵¹ Compl. ¶ 83.

²⁵² *Tennis Channel*, 717 F.3d at 986.

and is the fourth-ranked Spanish-language broadcast network.²⁵³ What LBI does not allege, however, is that those ratings bear any relationship to the fees it demanded from Comcast, or how those ratings would translate into increased subscribership (and in turn, revenue) for Comcast to offset those fees. As Comcast's expert economist, Dr. Israel, explains, from an economic perspective, the question Comcast must answer when choosing to carry a network is not whether it has "positive ratings" (as many networks do), but rather whether the value of the network exceeds the costs Comcast will incur by carrying it.²⁵⁴ Neither LBI nor its expert poses that question, much less answers it.

107. Indeed, even if LBI had alleged that it provides high ratings at a low cost—and this seems doubtful, given the high cost of LBI's proposals—this would not show a "net benefit" to Comcast because the data are not "correlated with changes in revenues to offset the proposed cost increase" incurred by broader distribution.²⁵⁵ Thus, even if EstrellaTV's ratings give it some "value," standing alone they do not satisfy the "net benefit" showing that LBI must make to sustain a claim of carriage discrimination.

108. As for EstrellaTV's carriage by MVPDs and broadcast affiliates, LBI alleges that, because they carry the network, they "value" EstrellaTV.²⁵⁶ But as Dr. Israel explains, the relevant question is not whether other MVPDs carry EstrellaTV, but whether those MVPDs carry the network on the terms LBI demanded from Comcast.²⁵⁷ LBI alleges nothing about the value these market participants actually place on EstrellaTV: nothing about the level of

²⁵³ Compl. ¶¶ 45–46.

²⁵⁴ Israel Decl. ¶ 16.

²⁵⁵ *Tennis Channel*, 717 F.3d at 986.

²⁵⁶ See, e.g., Compl. ¶¶ 5, 54–57, 63.

²⁵⁷ Israel Decl. ¶¶ 27–28.

carriage they give EstrellaTV, nothing about the fees they pay, and nothing else that would allow the Commission to determine that Comcast would derive a “net benefit” from carrying EstrellaTV on the terms LBI demanded from Comcast in 2014 and demands in this proceeding now. Their expert similarly sheds no light on these questions. Without more, LBI’s allegations that it brings “value” to MVPDs are “mere handwaving.”²⁵⁸

109. Although LBI has failed to come forward with any evidence of the fees it purportedly receives for carriage, publicly-available data from SNL Kagan show that in 2015 EstrellaTV earned only {REDACTED} in “network compensation” and only {REDACTED} in total non-advertising revenue.²⁵⁹ This indicates that MVPDs pay LBI {REDACTED} {REDACTED}.²⁶⁰ By contrast, LBI demanded {REDACTED} from Comcast. This marketplace evidence further demonstrates that Comcast could not receive a net benefit from carrying EstrellaTV on the terms LBI demanded.

110. Because LBI has not alleged any facts which, if proved, would establish that Comcast would receive a net benefit from EstrellaTV carriage, its claims of discrimination should be dismissed under the clear standard the D.C. Circuit just recently reaffirmed.

VI. ESTRELLATV IS NOT SIMILARLY SITUATED TO TELEMUNDO OR NBC UNIVERSO

111. LBI also fails to make out a circumstantial *prima facie* case of discrimination because it has not demonstrated that EstrellaTV is “similarly situated” to a Comcast-affiliated network.²⁶¹ LBI alleges that EstrellaTV is similarly situated to not just one,

²⁵⁸ See *Tennis Channel*, 717 F.3d at 985.

²⁵⁹ Israel Decl. ¶ 29.

²⁶⁰ *Id.* By comparison, SNL Kagan data show that in 2015 Telemundo earned over {REDACTED} in non-advertising revenue, indicating that MVPDs pay Telemundo far higher license fees than they pay LBI. *Id.*

²⁶¹ Second Report & Order, 26 FCC Rcd. at 11503–05, ¶¶ 13–14.

but two Comcast-affiliated networks, Telemundo and NBC Universo, and goes so far as to make the argument that it has “presented a stronger case on the merits than was made in prior Bureau-designated program carriage complaint cases (e.g., *Tennis Channel* and *Game Show Network*).”²⁶² But *ipse dixit* assertions are not a substitute for evidence, and the scant evidence upon which LBI relies falls far short of the similarly situated analysis that is required to make out a *prima facie* case of discrimination.

112. LBI’s claim rests on the mistaken assumption that, because Telemundo, NBC Universo, and EstrellaTV all target Hispanic audiences, they must be similar to one another. The Commission does not share LBI’s view of how to make out a *prima facie* case. Under the program carriage rules, LBI must show that EstrellaTV is similarly situated to Telemundo and NBC Universo based on “a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.”²⁶³

113. LBI has made no such showing, nor could it. Telemundo, NBC Universo, and EstrellaTV target and air different programming; indeed, LBI has admitted time and again that its strategy is for EstrellaTV to be “unique” in the Spanish-language television marketplace, and to explicitly counterprogram against established market leaders Univision and Telemundo. This means that the networks acquire, develop, and air dramatically different programming.

114. With their distinct programming, Telemundo, NBC Universo, and EstrellaTV target and capture different audiences; Telemundo targets a nationwide group of Spanish-speakers from all ethnic backgrounds, and delivers them in huge numbers, while EstrellaTV targets and attracts a heavily Mexican-American audience centered in the American

²⁶² Compl. vii (referring to *Tennis Channel Inc. v. Comcast Cable Comm’ns, LLC*, 25 FCC Rcd. 14149 (MB 2010) and *Game Show Network, LLC v. Cablevision Sys. Corp.*, 27 FCC Rcd. 5133 (MB 2012)).

²⁶³ Second Report and Order, 26 FCC Rcd. at 11504, ¶ 14.

West and Southwest. And while LBI has made broad claims about the comparable viewership of EstrellaTV and Telemundo, a comprehensive review of the Nielsen data show that Telemundo is far more popular, both nationally and in the relevant local markets.

115. Finally, Telemundo, NBC Universo, and EstrellaTV do not compete with one another in any economically meaningful way, including for programming, advertising, or viewership. The lack of significant competition between EstrellaTV and the Comcast-affiliated networks compels the conclusion that the networks are not similarly situated.

A. EstrellaTV Targets and Broadcasts Different Programming than Telemundo and NBC Universo

116. EstrellaTV's programming is not similar to Telemundo's or NBC Universo's. The very allegations in LBI's Complaint make this clear: EstrellaTV offers a "unique aggregation of Spanish language programming;" EstrellaTV consists of "unique programming;" EstrellaTV is defined by "unique original content."²⁶⁴ LBI's allegations that EstrellaTV is "unique" are borne out not only by its repeated public statements to that effect, but by EstrellaTV's actual programming mix, which shows that the genre and look and feel of its programming is quite different than that of NBC Universo and Telemundo.

1. LBI Admits that EstrellaTV Is Different than Telemundo

117. Since it founded EstrellaTV, LBI has repeatedly emphasized that the network is different and "unique." Indeed, EstrellaTV has built its brand identity on "counter-programming" against Telemundo, a network that, as described in the expert report of Professor López-Pumarejo, was built on the mainstay of traditional Spanish-language television, the *telenovela*.²⁶⁵ As Professor López-Pumarejo explains in detail, the *telenovela* is a distinct genre

²⁶⁴ Compl. ¶¶ 4, 39 n.89; Compl. Appendix ¶ 24.

²⁶⁵ López-Pumarejo Decl. ¶ 29.

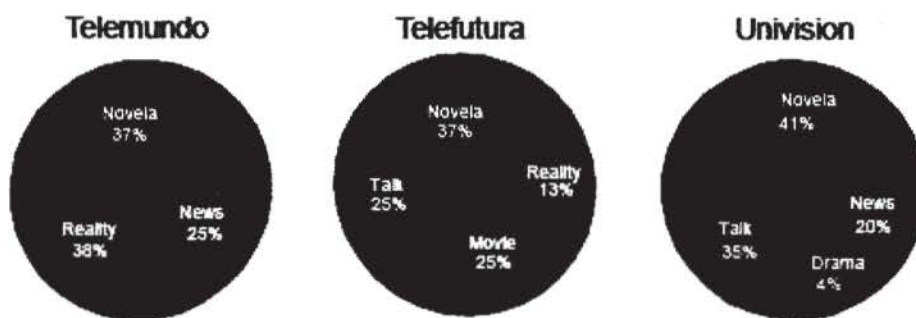
of scripted fiction with a romantic storyline at the core and a recognizable broadcast structure.²⁶⁶

Telenovelas attract large and devoted followings amongst Spanish-speaking audiences.

118. LBI made a conscious decision to make EstrellaTV's programming different. In a slide deck prepared for the network's 2009 upfront presentation for advertisers—a key forum for networks to brand themselves—EstrellaTV presented the following pie chart to describe the types of programming it was going to show:



and the following pie charts to describe the programming on leading Spanish-language networks, including Telemundo:²⁶⁷



119. At the time, LBI described its decision to offer a different programming genre mix as a strategic choice to “counter program existing Hispanic networks.”²⁶⁸ LBI's COO,

²⁶⁶ Unlike many English-language genres, *telenovelas* air each weeknight for one hour for several months, and then conclude. *Id.* ¶ 20.

²⁶⁷ *Id.* Ex. 3 at 29.

²⁶⁸ *Id.* at 8; see also *id.* at 50 (highlighting EstrellaTV's “Successful Counter Programming”).

Winter Horton, explained that EstrellaTV intended to “counterprogra[m]” by offering “talk shows, . . . variety shows, music shows, drama, [and] game shows.”²⁶⁹ LBI’s CEO, Mr. Liberman, said that it did not “make [] sense to fight against” *telenovelas*; the “way of winning” was to “offer[] alternative programming.”²⁷⁰ “Univision and secondarily Telemundo[] air novellas [*telenovelas*] in primetime,” but “[w]e don’t air any novellas . . . we provide an alternative—musical variety and comedy, scripted drama, comedy sketch shows. So it’s just different from a novella in every way.”²⁷¹

120. In the years since 2009, *telenovelas* have continued to be the core of Telemundo’s primetime programming; EstrellaTV’s core programming continues to be anything but. In 2012, Mr. Horton characterized the Spanish-language television market as “oversaturated” with *telenovelas*, and said that LBI would offer different programming: “If you’ve got five restaurants in a neighborhood that only serve burgers and you open one that serves chicken, you’re going to get some business. Not everybody wants to eat a burger every night.”²⁷² To this day, in marketing individual shows, EstrellaTV promises viewers

²⁶⁹ New Network Star Set To Launch, *Radio and Television Business Report* (Jan. 26, 2009), available at <http://rbr.com/new-network-star-set-to-launch/>. Mr. Horton further said that “The only thing you’re not going to see is a *novella*, because that’s what we’re programming against.” *Id.*

²⁷⁰ Laura Martinez, Q&A: Liberman Media’s Lenard Liberman, *Multichannel News* (Feb. 18, 2009), available at <http://www.lbimedia.com/Media/PressReleases/20090218.pdf>.

²⁷¹ Executive Session with Lenard Liberman: Now’s The Time For Next Hispanic Network, *TV News Check* (Mar. 17, 2009), available at <http://www.tvnewscheck.com/article/30437/news-the-time-for-next-hispanic-network>. See also Declaration of Blima Tuller, at ¶ 10, *Televisa, S.A. v. Liberman Broadcasting, Inc.*, No. 12-cv-09344 (C.D. Cal. 2012) (noting that “Our EstrellaTV programming consists primarily of internally produced programs such as, among other things, comedy programs, news, musical variety shows, a talent show, a celebrity dance competition, a celebrity gossip show, and a talk show, as well as purchased programs including Spanish-language movies.”).

²⁷² Adam Benzine, The Other America, *C21 Media* (Nov. 19, 2012), available at <http://www.c21media.net/the-other-america/?print=1>.

programming “no other network is providing”²⁷³ and content “unlike anything you’ve ever seen on Spanish-language television.”²⁷⁴

121. LBI described its programming in the same manner when it commenced retransmission consent negotiations with Comcast in the fall of 2014. During its initial October 14, 2014 meeting with Comcast, LBI [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁷⁶ As discussions continued throughout the fall of 2014, LBI [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁷⁷

2. EstrellaTV In Fact Programs In Different Genres than Telemundo and NBC Universo

122. Comcast’s experts, Robin Flynn of SNL Kagan and Professor López-Pumarejo, confirm that EstrellaTV has consistently executed its counter-programming strategy by showing different genres of programming than Telemundo and NBC Universo.²⁷⁸

123. The differences between EstrellaTV and Telemundo programming are stark. While Telemundo has for years focused its primetime lineup on a single genre, the

²⁷³ Adam Jacobson, Strong Ratings for Estrella TV in Los Angeles, *Multichannel News* (Dec. 16, 2014), available at <http://www.multichannel.com/strong-ratings-estrella-tv-los-angeles/386347>.

²⁷⁴ *Rica Famosa Latina Promo Video*, available at <http://videos.estrellatv.com/video/rica-famosa-latina-promo>.

²⁷⁵ Nissenblatt Decl. Ex. 2.

²⁷⁶ See ¶ 21, *supra*; Nissenblatt Decl. Ex. 2.

²⁷⁷ Compl. Ex. 19 (Nov. 26, 2014 email from J. Martinez).

²⁷⁸ See generally López-Pumarejo Decl.; Flynn Decl.